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# Supreme Court of the United States

JUN 8 2001

VERIZON COMMUNICATIONS INC., *et al.*,
*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF *AMICI CURIAE* FOR ALLEGIANCE TELECOM, INC., DSLnet COMMUNICATIONS, LLC, EL PASO NETWORKS, LLC, MPOWER COMMUNICATIONS CORP., PACWEST TELECOM, INC. AND US LEC CORP. SUPPORTING RESPONDENTS

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## STATEMENT OF AMICI INTEREST

Allegiance Telecom, Inc., DSLnet Communications, LLC, El Paso Networks, LLC, Mpower Communications Corp., PacWest Telecom, Inc. and US LEC Corp. are competitive local exchange carriers ("CLECs").[1] *Amici* provide both traditional voice service and advanced telecommunications services such as high-speed data service throughout the United States. *Amici* provide such service both through deployment of their own facilities and leasing of the facilities of incumbent local exchange carriers ("ILECs"). *Amici* are products of the Telecommunications Act of 1996 ("1996 Act") and are the type of facilities-based carriers that Congress envisioned would enter the market as a result of the 1996 Act.

The carriers submit this *Amici Curiae* brief to urge this Court to defer to the reasonable interpretation of the pricing requirements of the Act made by the Federal Communications Commission in its Order implementing the local competition provisions of the Act. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 F.C.C.R. 15499 (1996) ("*Local Competition Order*"). In that Order, the Federal Communications Commission implemented a forward-looking cost methodology that is designed to promote the development of competition in the local exchange market.

In adopting a forward-looking cost methodology, the FCC chose an approach that would balance the interests of all carriers, and consumers, and meet the pro-competitive goals of the Act. This methodology has assisted *Amici* and other

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[1] The parties have consented to the filing of this brief. The letters of consent have been filed with the Clerk of the Court. Counsel for parties did not author this brief in whole or in part. No person or entity, other than *Amici*, made a monetary contribution to the preparation and submission of this brief.

CLECs in providing competitive service throughout the United States in an efficient, and cost-effective manner. Adoption of the historical cost approach advocated by the Regional Bell Operating Company ("RBOC") petitioners would undermine this provision of competitive service and imperil the achievement of the goals of the 1996 Act.

*Amici* have invested substantial time and resources both in proceedings before state public utility commissions developing and applying this methodology, and in making market entry and investment decisions based on this methodology. Invalidation of the FCC's forward-looking cost methodology would have a wide-ranging impact on the telecommunications industry and on *Amici* in particular. Use of the historical cost methodology proposed by the RBOCs would force *Amici* and other CLECs to make the unenviable choice between inefficiently expending even more capital to deploy duplicative facilities or to exit certain markets altogether. Either choice would conflict with the goals articulated by Congress when it enacted the Act.

For these reasons, *Amici* are filing this brief, and respectfully request that this Court consider the important perspective they provide.

## SUMMARY OF ARGUMENT

1. Contrary to the assertion of the RBOCs, the meaning of "cost," both under the 1996 Act and in the context of the telecommunications industry, is far from clear, for the term has taken on various meanings throughout the years. Moreover, the 1996 Act fundamentally restructured the industry and transformed whatever notions of "cost" may have existed prior to the Act.

Because the meaning of "cost" is ambiguous, the FCC's interpretation of the meaning of "cost" as forward-looking cost, and its choice of a forward-looking cost methodology, is entitled under *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 843 (1984)("*Chevron*")



to deference if its interpretation is reasonable. The FCC's choice of methodology was neither arbitrary nor capricious, and was eminently reasonable.

The FCC's choice not only was appropriate, but also is the one most consistent with the pro-competitive goals of the 1996 Act. Congress, in enacting the 1996 Act, sought to foster increased competition, reduce consumer prices, and spur deployment of facilities. The FCC's methodology promotes efficient entry of competitors and rational deployment of facilities. The implementation of the FCC's Total Element Long Run Incremental Cost ("TELRIC") methodology has demonstrated that it has worked to make tangible the goals of the Act. The use of TELRIC has spurred significant facility investment by CLECs while at the same time not diminishing the investment ardor of the ILECs. At the same time, TELRIC has ensured that investment is not wasted on the construction by CLECs of duplicative facilities that could be constructed at lower cost by ILECs, but is targeted to broaden the deployment of facilities. The result has been the extension of the reach of competitive telecommunications services at market-based prices.

2. The RBOCs have not demonstrated that FCC's TELRIC methodology fails to provide them constitutionally adequate compensation or imperils their financial integrity. The RBOCs base their Takings Claim on their historical costs that are purportedly left "stranded" or unrecovered as a result of the FCC's asserted switch from an historical cost ratemaking methodology to a forward-looking methodology. The basis for recovery of these costs is rooted in a purported compact federal and state regulators made with the RBOCs that such costs would be recovered.

As this Court has held, however, when one bargains with the state nothing passes by implication and promises are to be narrowly construed. Contrary to the RBOCs' assertions, there has been no assurance from either federal or state regulators that the stranded costs would be recovered, and

there was no basis for such expectations. Even assuming *arguendo* that the RBOCs had a right to recover such costs, they have not demonstrated that these costs were significant, or that the compensation they are provided fails to recover these costs. The RBOCs have failed to show that the reduced rates "jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital." *Duquesne Light Company v. Barasch*, 488 U.S. 299, 312 (1989) ("*Duquesne Light*").

3. Invalidating TELRIC at this time would "strand" the investments of the CLECs. The CLECs made rational economic decisions to enter markets and deploy facilities based upon the FCC's forward-looking methodology. A switch to an historical cost approach would require CLECs either to engage in inefficient overbuilding of facilities or to exit markets. Either approach would result in a situation that is a contrary to the intent of Congress. Replacing TELRIC with an historical cost approach would frustrate the purpose of the 1996 Act.

## I. THE FCC'S CHOICE OF FORWARD-LOOKING COSTS OVER HISTORICAL COSTS WAS REASONABLE AND SHOULD BE ACCORDED DEFERENCE

### A. The Meaning of Cost

Section 252(d)(1)(A)(I) of the 1996 Act requires that "just and reasonable rates" be set for interconnection and network elements and that these rates be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." 47 U.S.C. § 252(d)(1)(A)(i) (FCC Pet. App. 118a-119a).[2] In implementing this statutory provision,[3]

[2] Since the parties are using a deferred appendix, citations to statutory provisions and the *Local Competition Order* will be made to the Appendix attached to the FCC's Petition for Writ of Certiorari as (FCC Pet. App. ___).

[3] This Court previously determined that the FCC has jurisdiction to design a pricing methodology to implement this statutory provision. *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999) ("*Iowa Utilities Board*").



the FCC has prescribed that rates be based on a forward-looking, replacement cost method which it terms TELRIC. *Local Competition Order*, ¶¶ 678-690 (FCC Pet. App. 66a-74a). The RBOCs argue that "the plain text, structure, and purpose of Section 252 make it clear that prices must include historical costs." *Brief for Petitioners, Verizon Communications, Inc., et al.*, at 16 ("*Petitioners' Brief*").

The meaning of "cost" in Section 252 is, however, far from clear. The concept of "just and reasonable rates based on cost" is a term in ratemaking for which "neither law nor economics has yet devised generally acceptable standards." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968), *accord Alabama Elec. Co-op, Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982)(cost "itself is an inexact standard"). As the court below observed, the word "cost" is a "chameleon" capable of many meanings in the regulatory context. *Iowa Utilities Board v. FCC*, 219 F.3d 744, 752 (8th Cir. 2000) ("*Iowa Utilities Board II*"); *see Strickland v. Commissioner, Maine Dept. of Human Services*, 96 F.3d 542, 546 (1st Cir. 1996)(there is "ambiguity inherent in the word 'cost.'"). Regulatory commissions have construed the term "cost" to support both "historical cost" and forward-looking reproduction cost approaches. *See* J. Bonbright, *et al.*, *Principles of Public Utility Rates* 109 (2d ed. 1988). During the period in which the FCC's pricing rules were vacated, many state commissions independently adopted the TELRIC methodology as the one most in accord with the requirements of the 1996 Act thus further supporting the FCC's

interpretation.[4] The Eighth Circuit thus reasonably concluded the term "cost" in Section 252 is "ambiguous." *Iowa Utilities Board II*, 219 F.3d at 752.

Even assuming *arguendo* that the word "cost" meant "historical" cost in the monopoly era prior to the enactment of the 1996 Act, the Act clearly effected a massive restructuring of the status quo.[5] Thus, even if "cost" meant "historical cost" prior to the 1996 Act, that meaning would have been placed in doubt given the fundamental restructuring effected by the 1996 Act. This is reflected in the admonition in Section 252 that a "rate-of-return or other rate based" methodology *not be used* to determine prices. 47 U.S.C. § 252(d)(1)(A)(i) (FCC Pet. App. 118a-119a). Rate-of-return proceedings are based upon use of historical costs. *See Illinois Bell Telephone Company v. FCC*, 988 F.2d 1254, 1258-59 (D.C.Cir. 1993)("*Illinois Bell*"). To promote competition, Congress clearly intended a departure from traditional costing principles.

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[4] *See, e.g., In re Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Unbundled Elements, and Transport and Termination Under the Telecommunications Act of 1996 and related Indiana Statutes*, Cause No. 40611, Order, 1998 WL 999945, *4 (1998) ("*IURC UNE Order*"); *In re Investigation Regarding Local Exchange Competition for Telecommunications Services*, Docket No. TX95120631, Telecommunications Decision and Order, 1997 WL 795071, *8 ( N.J. B.P.U. Dec. 2, 1997), *aff'd in part and vacated in part, AT&T Communications of New Jersey, Inc., et al.,v. Bell Atlantic-New Jersey, Inc., et al.; MCI Telecommunications Corp., et al., v. Bell Atlantic-New Jersey, Inc., et al.*, Nos. 97-5762, 98-0109 (D.N.J. June 6, 2000)

[5] As this Court noted:

> The Telecommunications Act of 1996 fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry.

*Iowa Utilities Board*, 525 U.S. at 372.



### B. The FCC's Interpretation Is Entitled To Deference

If a statute is "silent or ambiguous with respect to the specific issue, the question for this court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Court is not to decide whether the agency's interpretation "represents the best interpretation of the statute, but whether it represents a reasonable one." *Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue*, 523 U.S. 382, 389 (1998). The agency's interpretation will be upheld unless it is arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 843-44.

The FCC's adoption of TELRIC was neither arbitrary nor capricious. Far from being the "novel, complex, difficult to administer," "extreme" methodology that the RBOCs claim it to be, TELRIC is an extension of forward-looking, reproduction cost principles that at one point were widely used, and indeed were considered to be constitutionally mandated.

#### 1. *TELRIC Is Neither Novel Nor Extreme*

TELRIC is a long run incremental cost approach to ratemaking—long favored by regulatory lawyers, economists, and regulators—and is designed to replicate the market prices that would result under competition. W. Baumol and T. Merril, *Deregulatory Takings, Breach of the Regulatory Contract, and the Telecommunications Act of 1996*, 72 N.Y.U. L. Rev. 1037, 1063 (1997). TELRIC closely resembles the "Stand-Alone Cost" methodology adopted in the early 1980s by the Interstate Commerce Commission (now the Surface Transportation Board), and approved by the courts, for regulating railroad rates. *See, e.g., MidAmerican Energy Co. v. Surface Transp. Bd.*, 169 F.3d 1099 (8th Cir. 1999); *Burlington Northern R. Co. v. Surface Transp. Bd.*,

114 F.3d 206 (D.C.Cir. 1997); *Burlington Northern R. Co. v. I.C.C.*, 985 F.2d 589, 300 (D.C.Cir. 1993); *Arkansas Power & Light Co. v. I.C.C.*, 831 F.2d 569 (5th Cir. 1987); *Consolidated Rail Corp. v. U.S.*, 812 F.2d 1444 (3rd Cir. 1987).

Forward-looking incremental cost ratemaking is partially rooted in "fair value" ratemaking, long thought by the courts to be constitutionally required under the Fifth Amendment. *See Smyth v. Ames*, 169 U.S. 466 (1898). Under fair value ratemaking, a regulated firm is entitled to recover a return on the full value of its services, which variously requires reference to a number of indicators of the market value of the firm's "used and useful" assets and the cost of reproducing those assets. David Gabel and David Rosenbaum, *Who's Taking Whom: Some Comments and Evidence on the Constitutionality of TELRIC*, 52 Fed. Comm. L.J. 239, 246 (2000) (*"Gabel/Rosenbaum"*).

The principal criticism of fair value ratemaking was its circularity and difficulty of administration.[6] This Court eventually rejected the notion that fair value ratemaking was constitutionally required. *See Federal Power Commission v. Hope Natural Gas*, 320 U.S. 591, 602 (1944) (*"Hope Natural Gas"*). The Court did not, however, prohibit fair value ratemaking.

This Court has declined to elevate a single theory of valuation to constitutional status. The Court has held:

> [t]he adoption of a single theory of valuation as a constitutional requirement would be inconsistent with the view of the Constitution this Court has taken since

[6] According to Justice Brandeis's concurring opinion in *Southwestern Bell*, the present value of a utility could not be determined based on the "capitalizing of its net earnings, since the earnings are determined in large measure, by the rate which the company will be permitted to charge, and thus the vicious circle would be encountered." *See State of Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 292 (1923).



> *Hope National Gas, supra.* As demonstrated in *Wisconsin v. FPC*, circumstances may favor the use of one ratemaking procedure over another. The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors. The Constitution within broad limits leaves States to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.

*Duquesne Light Company*, 488 U.S. at 316. The Court specifically recognized that a rigid requirement of use of the historical cost methodology would "foreclose a return to some form of fair value ratemaking just as its practical problems may be diminishing." *Id.* at n. 10.

The Court in *Duquesne Light* was quite prescient in predicting the return of fair value ratemaking. As discussed above, the Surface Transportation Board, and its predecessor, the Interstate Commerce Commission, have successfully used approaches similar to TELRIC for years in determining the prices railroads may charge for use of their bottleneck facilities. As the FCC noted at the time it decided to use TELRIC, prior to the 1996 Act, a number of state public utility commissions independently employed, or had plans to employ, some form of long-run incremental cost ("LRIC") methodology in their approach to setting prices for unbundled network elements. *Local Competition Order* at ¶ 631 (FCC Pet. App. 56a-57a). The Public Utility Commission of Texas had employed LRIC-pricing methodologies for many years. *Id.* at n. 1508. Public utility commissions in Connecticut, California, Hawaii, Michigan, and Pennsylvania in 1994-1995 were requiring RBOCs to provide TSLRIC studies that are nearly identical to TELRIC for numerous services, including unbundled services.[7]

[7] CC Docket No. 96-98, Comments of AT&T Corp. at 49-50 (1996) (*"AT&T* Comments"); *DPUC Investigation into the Southern New*

Prior to the 1996 Act, the RBOCs were amongst the most ardent supporters of LRIC approaches. *See Gabel/Rosenbaum* at 257. In the late 1980s, the FCC unbundled certain services provided by RBOCs to promote efficient and innovative use of the RBOCs' networks by independent enhanced service providers ("ESPs") and to prevent discrimination on the part of the RBOCs in their offerings of certain basic service elements to competing ESPs and RBOC-owned ESPs. *In re Open Network Architecture Tariffs of Bell Operating Companies*, Order, 9 FCC Rcd. 440, ¶ 4 (1993). These unbundled basic service "building blocks" were designed to promote the ability of the RBOC's ESP competitors to compete effectively. *Id.* To develop pricing for some of these elements, the RBOCs used a forward-looking cost model, SCIS, that calculated investment costs based on replacement costs rather than historical or embedded costs. *Id.* ¶ 21; *In re 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services*, Report and Order, FCC 96-392, 11 FCC Rcd. 15227, ¶ 277 (1996).

Use of a "fantasy network" thus did not originate with the FCC. In determining their costs, the RBOCs have for some time clearly relied on networks that were far from actual. The best evidence that TELRIC is not a novel or extreme methodology comes from the RBOCs themselves.

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*England Tel. Co.'s Cost of Providing Service*, Decision at 25, 1995 WL 509180 (Conn. DPUC 1995); *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, Decision, 1995 WL 790383 (Cal. PUC 1995); *Investigation of the Communications Infrastructure of the State of Hawaii*, Order, 1995 WL 553009 (Hawaii PUC 1995); *Methodology to Determine Long Run Incremental Costs*, Opinion and Order, 156 P.U.R. 4th 1, 1994 WL 570779 (Mich. PUC 1994); *Standards and Safeguards for Competitive Services*, Decision, 1995 WL 933715 (Pa. PUC 1995).



### 2. *TELRIC Is Capable of Practical Implementation*

Contrary to the RBOCs' assertions, TELRIC is not inordinately complex or difficult to administer (at least in comparison to other cost-based ratemaking methodologies, none of which are particularly simple or straightforward). The FCC noted at the time of its implementation of TELRIC that a number of states had already implemented forward-looking costing methodologies to set prices for interconnection and unbundled network elements or support the use of such an approach. *Local Competition Order*, ¶ 681 (FCC Pet. App. 67a). Agencies increasingly use forward-looking cost methodologies based on economic modeling to set rates. *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1036-1037 (D.C. Cir. 1977) (courts "have approved the use of . . . hypothetical cost projection for some producers, as a means of arriving at a reasonable individual rate"). History has borne this out as 35 state public utility commissions have applied the TELRIC methodology. *Gabel/Rosenbaum* at 245.

In fact, the historical cost methodology may be the more speculative of the two methodologies, at least in the telecommunications context. Under an historical cost approach, one must not only determine the historical costs but also if they were prudently incurred. Rate-of-return regulation based upon prudently incurred historical costs requires numerous estimates and predictive judgments.[8] Thus,

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[8] As economists have observed:

> [I]t is uncertain as to whether the factual inquiry required for the conduct of a proper TELRIC study is any more hypothetical in nature than the judgments called for in determining whether or not capital costs, some of which were incurred decades ago, were "prudently" made or are "used and useful." Both the prudent and used and useful standards require an agency or court to ascertain the prospective demand for the products that will use the utility's facilities, the cost of alternative technologies, and the life-cycle

regardless of the methodology used, significant estimations and future cost predictions need to be made.[9] The estimations required in TELRIC are clearly not out of line with those that are a standard feature of ratemaking.

Even Justice Brandeis, who was skeptical about the speculative nature of estimating reproduction costs, noted that:

> estimating reproduction cost was useful and appropriate "as a means, either of supplying lacks in the proof of actual cost and investment, or of testing the credibility of the evidence adduced, or of showing that the cost of installation had been wasteful," and instances such as "when book values, or property accounts, furnish[] no trustworthy evidence either of cost or of real value."

*Gabel/Rosenbaum* at 255. In regard to pricing for interconnection and unbundled network elements, the situation Justice Brandeis described exists. As has been noted:

> The problem with this [historical cost methodology] is that the accounting systems currently used by the ILECs do not contain the data that is required for making pricing decisions regarding the provision of UNEs and the pricing of interconnection. These accounting systems were largely designed to track the financial standing of the corporation. Accounting data is typically

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costs of the facilities. All of these factors require considerable speculation and by definition are hypothetical in nature.

*Gabel/Rosenbaum* at 254.

[9] *Town of Norwood v. FERC*, 53 F.3d 377, 380 (D.C. Cir. 1995). As the D.C. Circuit observed in *Norwood:*

> Long-range estimates are an integral feature of ratemaking and financial analysis in general, and we have regularly approved reliance on admittedly imperfect future cost estimates.

*Norwood*, 53 F.3d at 380.



> not maintained at a level of granularity that is sufficient for determining the cost of individual components of the network or tariff elements.

*Id.* The RBOCs' historical cost approach may thus be more hypothetical than the FCC's TELRIC methodology. TELRIC may actually be more readily administered and more reliable than the historical cost approach.

### 3. *The FCC's Interpretation of "Cost" Is Consistent With The Legislative History Of The Act*

The FCC, when implementing the provisions of the 1996 Act, was faced with a novel and formidable task. The FCC had to try to eradicate the effects of decades of monopoly pricing and ensure that the pricing methodology it selected would promote competition and ensure efficient competitive entry into the local exchange market. The TELRIC methodology it selected was and is the one most suited to that task. This Court in *Chevron* observed that an agency will be accorded considerable deference if its choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" and its choice will not be disturbed "unless it appears that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845.

The choice the FCC made in adopting TELRIC was clearly in accord with the pro-competitive statutory policy embodied in the legislative history of the Act. The Act was designed to provide for a "pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." P.L. 104-104, Telecommunications Act of 1996, S. Conf. Rep. 104-230 at 1 (1996). The goal of promoting competition was to "secure lower prices and higher quality services for American telecommunications consumers." P.L. 104-104, H.R. Rep.

104-204(I) at 160 (1995). As the House Commerce Committee Report noted:

> Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.

*Id.* The FCC focused on implementing a cost methodology that would both be pro-competition and eliminate the vestiges of monopoly pricing.

Forward-looking pricing simulates the prices that would result in a competitive market. The FCC noted that "in dynamic competitive markets, firms take action based not on embedded costs, but on the relationship between market-determined prices and forward-looking economic costs." *Local Competition Order*, ¶ 620 (FCC Pet. App. 51a). Competition will drive prices down to forward-looking costs even if such costs are lower than a firm's historical costs. *Id.* ¶ 635.

The RBOCs argue that TELRIC hypothesizes a "fantasy world" that is divorced from the "real-world market." *Petitioners' Brief* at 9. In a "real-world" competitive world, however, companies must consider the available alternatives. If a new technology reaches the market, a company has the option of maintaining its existing plant and declining to partake of the new technology. To maintain its competitive position, however, such a company must adjust its pricing to meet the cost level that new competitors can achieve with the new technology. Thus, focusing on replacement cost is not the stuff of "fantasy"—rather, it accommodates the kind of pricing one would expect in the competitive market that Congress sought to create.

Requiring prices to be based on historical costs would distort competitive market entry decisions. As the Department of Justice noted in the *Local Competition Proceeding*, "pricing above forward-looking costs would



subject competitors to substantial risk of a price squeeze because the real cost of a network element for the incumbent LEC will be its forward-looking economic cost, while the cost to the new entrant will be the higher price charged for the element by the LEC." *Local Competition Order*, ¶ 635. ILECs would then be able to nip competition in the bud.

The RBOCs argue that use of TELRIC will distort the investment decisions of new entrants because it would "be irrational for entrants to deploy new facilities if they could purchase UNEs below any cost they could hope to achieve." *Petitioners' Brief* at 49. The RBOCs assert that this will make network elements "irresistible" and "choke off facilities-based entry." *Id.* The RBOCs fail to consider the corollary of their argument. Setting prices at historical costs levels, above long-run economic cost, will either (1) encourage inefficient facilities-based entry by rivals with costs below the ILECs' historical costs, but above the ILECs' economically meaningful forward-looking costs or (2) choke off entry altogether. Efficiency dictates that the build-buy decision be made based upon forward-looking, not historical, costs. If an RBOC can build a loop on a forward-looking basis for $15, but the RBOC's historical cost is $30,[10] the

[10] The RBOCs contend that "TELRIC prices are half the historical cost of UNEs." *Petitioners' Brief* at 31. *Amici*, by no means concede, however, that TELRIC prices are half the historical costs, or that TELRIC prices will always be lower than historical costs, particularly given the inability of RBOCs to demonstrate in a tangible manner what their historical costs are, and the manner in which particular inputs are defined by the state public utility commissions. *See supra* at 12 (discussing difficulty in quantifying RBOC historical cost) and *infra* at 23 (showing variation in cost inputs used by state commissions). In a proceeding before the North Carolina Utilities Commission, GTE, now part of Petitioner Verizon, argued that its total historical costs in North Carolina were actually "slightly lower than its total forward-looking costs." *Proceeding to Determine Permanent Pricing for Unbundled Network Elements*, NCUC Docket No. P-100 SUB 133D, Post-Hearing Brief of GTE South Incorporated at 47 (1998).

CLEC should be presented with a $15 price to buy the loop from the RBOC. If presented with an option to buy the loop from the RBOC for $30, and if the CLEC's cost to build the loop itself is $20, it will either inefficiently build the loop itself, even though the RBOC is the more efficient builder, or not enter the market at all. The folly of the RBOCs' argument is that it encourages the wasteful construction of duplicative facilities and stifles market entry.

TELRIC encourages efficient entry and precludes the wasteful deployment of facilities as demonstrated by the example above, because the new entrant will make the decision to build based on what is the most efficient and cost-effective option. As Justice Breyer noted:

> [o]ne can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition. . . .

*Iowa Utilities Board*, 525 U.S. at 416-417 (Breyer, J., concurring in part/dissenting in part). Congress did not want to encourage wasteful duplication of facilities by new entrants. Under TELRIC, if the economic cost to the new entrant dictates that the construction of its own facilities is more efficient and cost-effective, it will build the facilities.

The problem with the historical cost approach is that:

> [p]ermitting incumbent LECs to recover embedded costs in the prices they charge competitors for interconnection and unbundled network elements, while the incumbents experience much lower incremental costs, will result in inefficiently high prices that will either cause new



> entrants to over-build existing systems instead of maximizing the efficient use of the existing incumbent LEC's network, or discourage entry and investment in the local market altogether.

*Local Competition Order*, ¶ 655.

Although the RBOCs assert that TELRIC prices serve as a disincentive to CLEC investment, where UNE rates have been appropriately cost-based upon a TELRIC methodology, there has been substantial CLEC investment in facilities. Since 1997, CLECs have invested $56 billion in building their own networks. Association for Local Telecommunications Services, *The State of Local Competition 2001* at 20 (February 2001) ("*ALTS Report*"). Capital expenditures for CLECs in 2000 were valued at $24.9 billion compared to $33.6 billion for the RBOCs.[11] *Id.* at 21. CLECs reinvest a much larger portion of their revenues back into their facilities than the RBOCs, 63.7% to 20.6% respectively. *Id.* CLECs have deployed over 1,000 voice switches and 2,000 data switches. *Id.* at 24. Since 1997, CLECs have almost tripled the number of network route miles they have in service. *Id.* at 25. CLECs that either primarily rely on their own facilities, or lease unbundled network elements from the RBOCs in conjunction with their own facilities, comprise almost 70% of the CLEC market. *Id.* at 12. Thus, contrary to RBOC assertions that "many entrants rapidly changed their plans away from deploying competitive facilities," *Petitioners' Brief* at 13, there has been significant facilities-based investment under TELRIC, and this tracks what the FCC

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[11] In January 1997, Petitioner United States Telecom Association reported that ILECs were investing more than $20 billion annually in their networks. Bruce A. Kushnick, *The Unauthorized Bio of the Baby Bells* at 202 (1999 ed.). Thus, RBOC investment under TELRIC has not decreased, but increased.

predicted would occur.[12] The FCC correctly concluded that use of TELRIC would best meet the pro-competitive goals of the Act. TELRIC ensures efficient investment decisions and competitive entry.

## II. THE FCC'S TELRIC METHODOLOGY PROVIDES CONSTITUTIONALLY ADEQUATE COMPENSATION

### A. The Takings Standard

This Court has found that the quasi-public/quasi-private status of a public utility creates a unique set of questions under the Takings Clause of the Fifth Amendment. *Duquesne Light*, 488 U.S. at 308. The Court has concluded that the guiding principle in analyzing takings challenges in this context is that the "Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' to be confiscatory." *Id.* This Court has declined to focus on the merits of a particular cost methodology, but rather on the overall effect and impact of use of that methodology, noting:

> [I]t is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.
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> * * *

[12] CLECs' use of their own facilities should increase over time as CLECs build out their own networks. The purchase of unbundled network elements will serve as bridge that will provide CLECs "with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, ¶¶ 52 (1999) ("*UNE Remand Order*"); *see ALTS Report* at 12.



> [T]he economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by the countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other respect.

*Id.* at 310, 313. An end result is confiscatory only if it is shown that the regulation "threatens the financial integrity of the [regulated carrier] or otherwise impedes [its] ability to attract capital." *Illinois Bell*, 988 F.2d at 1263.

### B. The RBOCs' Stranded Cost Argument

The RBOCs claim that the purported shift by the FCC in pricing methodologies from historical cost to forward-looking costs "strands" half their historical costs. *Petitioners' Brief* at 28. The RBOCs argue that regulators made a compact with them:

> [b]y promising investors a fair opportunity to recover all capital prudently invested and insulating them from the risk of asset value fluctuation, regulators could insist on lower rates of return and extended depreciation schedules.

*Id.* at 29.[13] The threshold question is whether such a compact or contract exists.

[13] The RBOCs are espousing a "regulatory contract" theory which:

> [I]n its simplest terms, . . . is an agreement with the state that requires the utility to invest its resources in some expansion of the enterprise, such as a new power generation plant. In return, the state

This Court has long held that "in grants by the public, nothing passes by implication." *Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 546 (1837). As has been observed:

> [t]he Supreme Court has reiterated time and time again: When one bargains with the state, nothing passes by implication and promises are to be narrowly construed. This principle dramatically undermines the claims that utilities generally enjoy the benefits of a regulatory contract protecting them from stranded costs.

*Hovenkamp* at 808-09, *citing, inter alia, National R.R. Passenger Corp. v. Atchinson, Topeka, & Santa Fe Ry.*, 470 U.S. 451, 466 (1985)("a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise"); *United States v. Grand River Dam Auth.*, 363 U.S. 229, 235 (1960); *Keefe v. Clark*, 322 U.S. 393, 396-97 (1944); *Stone v. Wisconsin*, 94 U.S. 181 (1876).[14]

The RBOCs have not established, nor can they establish, that there was any such assurance from federal or state regulators that they would recover their historical costs. As the FCC noted:

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> guarantees a rate of return that . . . promises to remove the risk of improvident investment.. . . If such a contract exists, deregulation and the resulting obsolescence of stranded facilities require compensation to the utilities, as the government would be reneging on its side of the regulatory bargain.

Herbert Hovenkamp, *The Takings Clause and Improvident Regulatory Bargains*, 108 Yale L.J. 801, 806 (1999) ("*Hovenkamp*").

[14] Similarly, given the substantial public interest involved on the side of the government, only in the rarest cases would a plaintiff be able to succeed against the government on an estoppel theory. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59-60 (1984).



> [c]ontrary to the assertions by some incumbent LECs, regulation does not and should not guarantee full recovery of their embedded costs. Such a guarantee would exceed the assurances that we or the states have provided in the past.

*Local Competition Order*, ¶ 706 (FCC Pet. App. 87a).

The RBOCs have failed to demonstrate a basis that would entitle them to recovery of their stranded costs. This fact has been evidenced in recent court cases. The Court of Appeals of Arizona rejected a claim that regulators had entered a "regulatory contract" with the local ILEC. *US WEST Communications, Inc. v. Arizona Corporation Commission*, 3 P.3d 936, 941-42 (Ariz. Ct. App. 1999). The U.S. Court of Appeals for the Fifth Circuit struck down a takings challenge to TELRIC in the universal service context finding that the Supreme Court's confiscatory rulemaking decisions "do not require courts to engage in takings analysis whenever an agency opens a previously regulated market to competition." *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 413, n. 14 (5th Cir. 1999), *cert. dismissed*, 121 S.Ct. 423 (2000).

The New York Public Service Commission denied recovery of stranded revenues to companies operating under incentive regulation plans, such as New York Telephone and Rochester Telephone, that "gain opportunities for greater earnings" under such plans but also "bear the risk of poor earnings and stranded revenue." *Transition to Competition in the Local Exchange Market*, NY PSC Case No. 94-C-0095, Opinion No. 96-13, 1996 WL 302398, *55 (1996); *see also, Local Competition Order*, ¶ 656. NARUC, the body of state public utility commission regulators, recommended in 1996 that companies operating under price cap regulation not be allowed to recover their stranded investment costs. NARUC Staff Subcommittee on Communications, *Local Competition Work Group Summary Report* at 52-53 (1996); AT&T

Comments at 71-72, n. 105. In 1995, before the enactment of the 1996 Act, BellSouth reported a writedown of $2.7 billion because "it is doubtful that regulated rates sufficient to recover the net book value of telephone plant could be charged to and collected from customers due to expected levels of future competition." BellSouth Corporation, Securities and Exchange Commission Form 10-K, Annual Report at 34 (1995); AT&T Comments at 71-72, n. 105. Thus, even the RBOCs had no expectation of recovering stranded costs, and regulators certainly were not giving them this impression.

### C. The RBOCs Were Adequately Compensated, And Will Continue to Be Adequately Compensated, for their Historical Costs

Even assuming *arguendo*, that a regulatory contract has been established, the RBOCs have failed to demonstrate that TELRIC does not adequately compensate them for their historical costs or that they have not already been adequately compensated for such costs. In fact, the FCC noted that other than advancing figures of stranded costs for which they provided no basis, no ILEC had "provided persuasive evidence that prices based on a forward-looking economic cost methodology would have a significant impact on its 'financial integrity,'" which is the relevant standard under *Illinois Bell*. *Local Competition Order* at ¶ 738 (FCC Pet. App. 95a). The FCC, in fact, left the door open for ILECs to make such a showing, and if they were able to do so, they could petition to seek relief from the methodology. *Id.* ¶ 739 (FCC Pet. App. 95a). No ILEC has even attempted to make such a showing of significant stranded costs.[15]

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[15] Jim Chen, *Standing in the Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, 71 U. Colo. L. Rev. 921, 935 (2000).



As noted above, it would be very difficult for the RBOCs to quantify their historical costs, much less do a comparative analysis. The FCC correctly concluded that based on the record before it that there was no support for the claim that significant residual costs would result from the use of a forward-looking methodology. *Local Competition Order*, ¶ 707 (FCC Pet. App. 88a). As a commenter in the *Local Competition* proceeding noted, "nominal losses in economic value attributed to stranded investment should be weighed against the appreciation in value that incumbent LECs have experienced in share prices and market-to-book ratios." *Local Competition Order*, ¶ 659. RBOCs have claimed that they have had to carry reserve deficiencies as a result of lengthy depreciation schedules dictated by regulatory bodies, but the market data belies this claim. The limited available market data "clearly shows that the book value of the ILEC assets is significantly less than the market value of the assets." *Gabel/Rosenbaum* at 266. As these economists conclude, "the fact that ILEC exchange assets are commanding prices on the open market which are of a magnitude greater than their book value vitiates the ILECs' contention that implementation of TELRIC will result in stranded costs." *Id.*

The RBOCs also fail to show that TELRIC will not adequately compensate them for any stranded cost that may occur. As the FCC noted, TELRIC provides an adequate return to the RBOCs because "properly designed depreciation schedules should account for expected declines in the value of capital goods." *Local Competition Order*, ¶ 686 (FCC Pet. App. 71a-72a).

The RBOCs mistakenly argue that the FCC has ensured that TELRIC will yield massive price reductions by maintaining low-risk cost of capital and extended depreciation rates transplanted from the monopoly regime. *Petitioners' Brief* at 10. In fact, the FCC left the determination of cost of capital and depreciation rates to the states and clearly encouraged the use of cost-of-capital and depreciation rates

that would adequately cover the RBOCs' cost of capital and accurately reflect the economic lives of their facilities. *Local Competition Order*, ¶ 702 (FCC Pet. App. 83a). The implementation of TELRIC has borne this out. For instance, the FCC had opined that its proposed cost of capital figures of 11.25% may have been too high given the current marketplace cost of equity and debt, but it opted for a forward-looking figure that would generate higher costs than warranted by the actual state of competition. *Id.* The Massachusetts Department of Telecommunications and Energy went beyond the high FCC figure and utilized a cost of capital of 12.16 percent that was higher than the cost of capital it has used in setting Petitioner Verizon's retail local rates. *Application of Verizon New England Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, 2001 WL 388287, ¶ 38 (Apr. 16, 2001).

The Indiana Utility Regulatory Commission ("IURC") likewise allowed for the economic lives that were substantially shorter than those prescribed by the FCC, and shorter than those suggested by the historical life indications of Ameritech's existing facilities,[16] in order to reflect a possible need to upgrade equipment more quickly to compete in an evolving market. *IURC UNE* Order at 9-10. Thus, far from being restricted to use of depreciation rates and cost of capital from the monopoly regime, *Petitioners' Brief* at 10, the RBOCs have been pushing for, and often receiving, forward-looking depreciation rates and costs of capital that go beyond the competitive risks they face.[17]

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[16] Ameritech is a subsidiary of Petitioner, SBC Communications, Inc.

[17] In fact, in a recent filing with the Massachusetts Department of Telecommunications and Energy, Verizon, contrary to the argument it makes here, cited the *Local Competition Order* for the proposition that TELRIC requires a forward-looking cost of capital. *Compare* MA DTE Docket No. 01-20, Direct Testimony of Dr. William Taylor on Behalf of Verizon New England d/b/a Verizon Massachusetts at 11 (May 4, 2001) *with Petitioners' Brief at* 10.



The application of TELRIC has demonstrated that it protects the financial integrity of the RBOCs. Two economists who studied the profitability of RBOCs since the enactment of the 1996 Act found:

> Given the rates of return on regulated investment, and the rates of return on embedded investment, it seems clear that the majority of telephone companies in the survey are earning returns that are more than sufficient to assure confidence in the financial integrity of their enterprises, maintain their credit worthiness and to enable them to attract additional capital. Based on this data it would seem that the ILECs and their supporters' contention, that use of the TELRIC methodology, on its face, results in a taking, is not grounded in the reality depicted by their earnings reports.

*Gabel/Rosenbaum* at 265. The RBOCs have failed to show that, even if they are entitled to recovery of any stranded costs, TELRIC fails to provide them with constitutionally adequate compensation. Clearly the financial integrity of their enterprises has *not* been imperiled, and is in no danger of being imperiled.

In fact, it is premature to consider if there will be a shortfall. As noted in the *Local Competition* proceeding, "the size of any shortfall between historical costs and TSLRIC's forward-looking costs will not be determined for many years after interLATA entry." *Local Competition Order*, ¶ 655. Petitioners concede that interstate access and long distance charges are two sources of revenue that may provide recovery for stranded costs. *Petitioners' Brief* at 36, n. 15. For instance, access charges for years have been set well in excess of the Petitioners' economic costs of providing access

service to provide subsidies for universal service. Alfred Kahn & William Shew, *Current Issues in Telecommunications Regulation: Pricing*, 4 Yale J. Reg. 191, 193-95, 202, n.28 (1987). Likewise, the RBOCs' entry into the interLATA market pursuant to the 1996 Act will provide substantial revenue that should more than compensate for any nominal stranded cost there may be. It should not be forgotten that the RBOCs were among the supporters of the 1996 Act, and it is reasonable to believe that it was their recognition of the lucrative benefits of interLATA entry that fueled this support. *See*, P.L. 104-104, S. Rep. 104-23 at 26-29 (1995). Thus, regulators could use revenues from one of these areas to offset any deficiency that arises from UNE rates, if such a deficiency is ever demonstrated by the RBOCs.[18]

## III. INVALIDATING TELRIC AT THIS STAGE WOULD UNDO THE COMPETITIVE ADVANCES MADE SINCE 1996

As has been demonstrated, the FCC clearly made not only a reasonable choice, but the appropriate choice. The choice was made after much deliberation and evaluation of the alternatives and was substantially supported by the record elicited in the proceeding. The choice of TELRIC resulted in a rate order, the total effect of which is reasonable and does not imperil the financial integrity of the RBOCs. As this

[18] *See, Qwest Corporation v. U.S.*, 48 Fed.Cl. 672, 696 (2001). The Court of Federal Claims noted that Plaintiff Qwest's physical takings claim must be considered in the "context of the comprehensive legal framework established by the Telecom Act." *Id.* The court noted that the Telecom Act "created a matrix of interlocking opportunities for ILECs" where "they could enter some new markets, but the *quid pro quo* was that they open up their own local exchange markets to competition." *Id.; see also, National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 418 (1992) (upholding broad construction by Interstate Commerce Commission of its condemnation authority that implemented and interpreted the statute in a manner that comports with its words and structure).



Court has noted, under these circumstances, judicial inquiry must end, and deference be given to the choice of the expert agency.

Courts are reluctant to encroach on the province of expert agencies particularly when "the economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result." *Duquesne Light*, 488 U.S. at 314. As this Court has astutely observed, "the Constitution is not designed to arbitrate these economic niceties." *Id.* If the Court were to invalidate TELRIC at this time, it would undo the competitive inroads that have been made in the telecommunications industry and imperil the already precarious state of local competition. It would also "strand" billions of dollars that have been invested in the CLECs and their facilities. The invalidation of TELRIC would undermine the very pro-competitive goals that provide the foundation of the 1996 Act.

The replacement of TELRIC with an historical cost approach will not eliminate the asserted problem of stranded investment, as now it will be the CLECs whose investment will be stranded. As described above, the CLECs have invested over $56 billion in building their networks since 1997. CLECs properly based their decisions to enter markets and make investments based on the relationship between market-driven prices and forward-looking economic costs. A shift in the methodologies to historical costs would trap the CLECs in the price squeeze described above. For example, Petitioners argue that in New York the average historical cost for a copper loop is $33.20 per month while the TELRIC price is $14.52 per month.[19] *Petitioners' Brief* at 14. The

[19] Once again, it should be noted that *Amici* do not concede the validity of Petitioners' unsubstantiated historical cost figures. These figures are simply used by *Amici* to show that, taking Petitioners' figures at face value, basing UNE rates on such figures would either lead to wasteful deployment or exit of some competitors.

forward-looking cost for the CLEC to construct its own loop would be higher than the forward-looking cost for the RBOC because the CLEC does not have the same economies of scale and large customer base that the RBOC has. *See, Local Competition Order*, ¶¶ 655, 679 (FCC Pet. App. 66a); *UNE Remand Order*, ¶¶ 181-183. Thus, in most cases, the CLEC's cost to deploy that loop itself would be expected to be higher than $14.52 per month.[20]

If the CLEC chooses to build the loop itself, this is wasteful and an inefficient use of resources as it is more efficient for the RBOC to build the loop. As the FCC has noted, requiring CLECs to self-provision facilities such as loops would "materially raise entry costs, delay broad-based entry, and limit the scope and quality of a competitor's offerings," and is "not an adequate alternative for loops that a carrier can obtain from an incumbent LEC." *UNE Remand Order*, ¶ 181; *see id.* at ¶ 182. The historical cost approach would thus lead to the inefficient overbuilding of facilities that will delay competitive entry. Petitioners argue that the "expeditious introduction of competition" is one of the important objectives of the Act, but their approach would put the brakes on such competitive entry. *Petitioners' Brief* at 46; *see also*, at 48 (Congress "envisioned a system in which entrants achieved efficiencies and introduced innovations that gradually created the genuine benefits of a competitive market . . . .")

Some CLECs who have built some facilities (those as to which the ILEC does not have a particular cost advantage) while leasing others (as to which the ILEC has a cost advantage because of economies of scale) from ILECs at TELRIC prices may find that under the historical cost approach it is cost-prohibitive to compete. The investments made by these CLECs in their own facilities will be stranded

[20] The FCC has estimated that it costs $885 per line to construct a local exchange network. *Petitioners' Brief* at 11, n. 6.



by the change in methodology. They made a decision to enter the market based on forward-looking prices for network elements and invested in other facilities based upon the expectation of being able to lease bottleneck facilities from the ILEC at forward-looking prices. A doubling of the price for a leased facility, as Petitioners contend, may make continued use of that facility so costly that they have to exit the market. This would frustrate the goal of promoting competition.[21]

Invalidation of TELRIC may also imperil much of the competitive entry that has been made in the past five years. While CLECs have made substantial investments to enter markets, ILECs still dominate the local exchange market. The ILECs control 92% of all local access lines. *ALTS Report* at 9 (Feb. 2001).

Use of an historical cost approach will effectively preclude CLEC utilization of ILEC network elements since it would be cost-prohibitive to do so. Thus, CLECs, if they desire to remain in the market, will be forced to overbuild ILEC facilities at a time when available capital is scarce. Under this scenario, available capital will be wasted on an inefficient duplication of ILEC facilities when it would be much more efficient and reasonable for the CLECs to lease network elements from the ILEC. The capital wasted could be more prudently invested in needed facilities to extend the reach of telecommunications service, rather than to create duplicative facilities.

The question ultimately becomes at what price do we want to ensure the RBOCs' recovery of their purportedly "stranded" costs. The recovery of these costs creates costs of

[21] The implications of the historical cost approach are not limited to use of unbundled network elements. TELRIC is also utilized to price interconnection and collocation services that are vital for connecting the networks of two separate carriers. Basing interconnection and collocation prices upon historical costs will further impede competition.

their own. As Professor Chen notes, "stranded cost recovery, whether by legislative order or by a judicial finding of confiscatory ratemaking, shifts costs from past utility investors squarely onto the shoulders of current and future customers." *Chen* at 936. In 1996, Congress knew the actions it would take might alter the financial bottom-line of the RBOCs, but it felt that the advent of competition in the local market was worth this cost. Additionally, it gave the RBOCs incentive to allow for such competition by providing for their entry into the long distance market once certain requirements are met. By implementing TELRIC, the FCC merely made manifest the choice Congress had already made, *i.e.*, to adopt a methodology that will promote the rapid and efficient development of competition. The RBOCs, now well on their way to achieving entry into the long distance market, ask this Court to turn back local competition and retreat to the monopoly days where their returns were protected, but at the price of competition. This Court should reject this overture and defer to the reasonable and appropriate choice made by the FCC.

## CONCLUSION

Wherefore, *Amici* respectfully request that this Court deny the appeal of Petitioners Verizon Communications, Inc., *et al.*, and uphold the Order of the Federal Communications Commission pertaining to its TELRIC methodology.

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